Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

WILBUR HARPER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Montgomery County, Ohio, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Does the failure of the trial court to provide a cautionary instruction, "not to talk about the case with each other," at the various recesses during a trial violate a defendant's right to a fair trial and due process of law in a criminal case as guaranteed under the Fifth Amendment to the United States Constitution?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Wilbur Harper, prays that a writ of certiorari issue to review the judgment of opinion of the Court of Appeals for Montgomery County, Ohio, Second Appellate District, entered in this proceeding on August 12, 1994.

II. OPINIONS BELOW

The opinion of the Court of Appeals for Montgomery County, Ohio, appears in the Appendix to this petition. The Appendix also includes the Decision and Entry by

the Supreme Court of Ohio, denying certiorari, dated January 18, 1995.

III. JURISDICTION

The Court of Appeals for Montgomery County, Ohio, rendered its Opinion on August 12, 1994. Also on August 12, 1994, the Court of Appeals for Montgomery County, Ohio, filed a Final Entry of Judgment pursuant to that Opinion. Subsequently, the Petitioner filed in the Supreme Court of Ohio a Memorandum in Support of Jurisdiction, pursuant to a Notice of Appeal that had been timely filed with the Court of Appeals for Montgomery County, Ohio. The Supreme Court of Ohio denied leave to appeal on January 18, 1995.

The jurisdiction of this honorable Court is invoked under 28 U.S.C. Section 1257(a).

IV. STATEMENT OF THE CASE

This case is a one-on-one alleged rape with no physical evidence and conflicting accounts having been given by the accuser, Tamesha Watkins. Both the accused, Wilbur Harper, and the accuser testified at trial.

On September 8, 1992, between 6:00 to 6:30 P.M., a girl, Tamesha Watkins, came in to Ray's Drive Thru in Dayton, Ohio. She was crying, but not loudly nor hysterically, and was asking for her mother. Her clothes were normal, not disheveled; and nothing unusual appeared about her hair. Miss Watkins told the police officer who

responded to the scene that a man in a red Nissan with a black bra, a sun roof, and license plate number CYZ 810, pulled her into his car and forced her to engage in oral sex, fondled her breasts, and fondled her vagina. At a different location the man attempted to have vaginal intercourse with her.

She described the assailant as a black male, age 30, with a beard, mustache, and short hair. She gave no indication as to the approximate height or weight of the assailant. She first stated he let her out at one location, she later stated he let her out at a different location.

At trial the police officers testified that they understood Miss Watkins' description to mean that her assailant had a full beard; they, however, attempted to argue that Miss Watkins may have meant a "shadow" instead of a full beard. At trial, Miss Watkins also used the word "shadow," for the first time. Similarly, at trial Miss Watkins changed her description of the car to "burgundy" rather than "red."

The medical evidence from the rape kit was negative for the presence of semen and/or sperm. Nothing of evidentiary value was obtained from the pubic hair combings, the fingernail scrapings, or the clothing of Miss Watkins.

V. REASON FOR GRANTING THE WRIT

Ohio law requires the trial court to instruct the jury at various recesses not to discuss the case among each other until the case is finally submitted to them. Ohio Revised Code Section 2945.34 provides:

> If the jurors are permitted to separate during a trial, they shall be admonished by the court not to converse with, nor permit themselves to be addressed by any person, nor to listen to any conversation on the subject of the trial, nor form or express any opinion thereon, until the case is finally submitted to them.

Recess instructions have been formulated to comply with the statute. *See*, 4 O.J.I. 402.25. One function of this statute and its corresponding jury instruction is to promote the orderly and fair administration of justice and to protect the parties' constitutional right to a fair trial and to due process of law. This statute has been interpreted by the Ohio Supreme Court to be mandatory. *State v. Cox*, 42 Ohio St. 2d 200 (1975). In *Cox*, the Ohio Supreme Court stated:

> The importance of cautionary instructions is evident from sections of the Revised Code which set forth a *statutory mandate* that the court give such instructions at specific times during the trial. See R.C. Sections 2945.33 and 2945.34. (emphasis added).

Id., 42 Ohio St. 2d at 207-208.

In *Cox*, the Ohio Supreme Court found no reversible error where the trial court had "adequately and repeatedly" cautioned the jury during the trial. This holding suggests that substantial compliance with the statute is

adequate to satisfy the statutory mandate. In the instant case, however, the trial court gave no admonitions at any of the recesses. This failure of the trial court to admonish the jury to not discuss the case during the various recesses throughout the course of a three-day trial denied Petitioner his right to a fair trial and to due process of law as guaranteed under the Fifth Amendment to the United States Constitution. Although the failure to so instruct the jury once or twice might satisfy this requirement through substantial compliance, the absolute failure to so instruct the jury prejudices the Defendant's right to a fair trial.

Improper jury instructions in a state criminal trial may be the foundation for a claim of a violation of a federal constitutional right to due process of law. *Jeffries v. Blodgett*, 771 F. Supp 1520 (W.D. Washington 1991). Similarly, cumulative errors may become a violation of due process of law, even when the individual errors in themselves would be harmless. *United States v. Parker*, 997 F.2d 219 (6th Cir. 1993). As the United States Court of Appeals for the Sixth Circuit stated:

> There were four errors below that cumulatively necessitate reversal of the convictions. Taken in isolation, these errors may be considered harmless. . . . After examining them together, however, we are left with the distinct impression that the due process was not satisfied in this case.

997 F.2d at 221 (citations omitted). Thus, while the omission of the recess instruction on one or even two occasions might be considered substantial compliance with the statute and harmless error, the absolute failure to

provide the required recess instruction to the jury constitutes plain error and a substantial violation of the defendant's right to due process of law as guaranteed under the Fifth Amendment.

VI. CONCLUSION

Petitioner submits that the trial court's failure to follow the requirements of the statute denied him a fair trial. Petitioner asks this Court to exercise its jurisdiction over matters raised under the rubric of the United States Constitution and grant certiorari in this matter so the issue may be fully briefed and argued.

Respectfully submitted,

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